STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of

John Broderson
Eye Pop East Capitol Corp
291 0 W Capitol Dr
Milwaukee WI 53216

PECFA Claim #53212-1207-07
Hearing #96-227

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed June 24, 1996, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce, a hearing was commenced on, at Madison, Wisconsin. A proposed decision was issued on December 22, 1997, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

> Whether the department's decision dated June 10, 1996 denying reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of $23,372.72, plus interest, was reasonable.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

John Broderson
Eye Pop East Capitol Corp
2910 W Capitol Dr
Milwaukee WI 53216

By: Ronald P. Brockman
Hand & Quinn
932 Lake Ave
Racine WI 53403-1519

Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Kristiane Randal
Department of Commerce
201 W. Washington Ave., Rm. 623
PO Box 7970
Madison WI 53707-7970

The authority to issue a final decision in this matter is made by the Acting Secretary of the Wisconsin Department of Commerce and any delegation of this authority that may have been made in this matter is revoked.

The matter now being ready for decision, I hereby issue the Following

FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated December 22, 1997 are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated December 22. 1997 are hereby adopted for purposes of this Final Decision.

DISCUSSION

The Discussion in the Proposed Decision dated December 22, 1997 is hereby adopted for purposes of this Final Decision.

FINAL DECISION

The Proposed Decision dated December 22, 1997, is hereby adopted as the Final Decision of the Department (Understanding that the clerical error in the Proposed Decision citing June 24, 1996 as the Department's Decision is corrected to June 10, 1996).

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in See. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6h Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: October 19, 1998

Philip Edw. Albert
Acting Secretary

Department of Commerce
PO Box 7970
Madison WI 53707-7970

cc: Ronald P. Brockman, Esq., Hand & Quinn
Kelly L. Cochrane, Esq., Wisconsin Department of Commerce
Dispute Resolution Coordinator, PECFA

Date Mailed: October 20, 1998

Mailed By: Diane S. Castillon

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
1801 Aberg Ave., Suite **A**
P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608)242-4813

John Broderson
Eye Pop East Capitol Corp

Hearing Number: 96-227
Re: PECFA Claim # 53212-1207-07

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and order in the above-stated matter. Any Party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

STATE HEARING OFFICER:
James H. Moe

DATED AND MAILED:
December 22, 1997

* *

MAILED TO:

Appellant Agent or Attorney

Ronald P. Brockman
Hand & Quinn '
932 Lake Avenue
Racine, WI 53403

Department of Commerce

Kristiane Randal, Assistant
Legal Counsel
P.O. Box 7970
Madison, WI 53707-7970

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT

IN THE MATTER OF:

Request for Reimbursement Pursuant
to the Provisions of the PECFA Program

Hearing Number: 96-227
PECFA Claim Number: 5312-1207-07

John Broderson
Eye Pop East Capitol Corporation
Appellant,

vs.

Wisconsin Department
of Commerce,

Respondent.

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

On June 10, 1996, the Department of Commerce (department) issued a decision denying John Broderson/Eye Pop East Capitol Corporation (appellant) reimbursement of four invoices totaling $22,759.14 and the interest associated with those invoices totaling $422.58, under the Petroleum Environmental Cleanup Fund Act (PECFA) program. The appellant filed a timely request for hearing on June 24, 1996. Pursuant to that request, a hearing was held on July 9, 1997 in Madison, Wisconsin, before Administrative Law Judge James H. Moe, acting as State Hearing Officer.

Based the applicable records and evidence in this case, the state hearing officer makes the following

PROPOSED FINDINGS OF FACT

1. At all times relevant, Eye Pop East Capitol Corporation (appellant) was the legal owner of property located at 201 East Capitol Drive in Milwaukee, Wisconsin (the subject property). John Broderson is the president and sole shareholder of the corporation.

2. The subject property was previously remediated in 1993 and a closure letter was issued by the Wisconsin Department of Natural Resources on June __, 1993. The remediation involved the removal of a 1000-gallon underground fuel oil storage tank and the removal of about 300 cubic yards of contaminated soil. The cost of that work was not eligible for PECFA reimbursement.

3. The subject property was subsequently purchased by the appellant. In June of 1994, the appellant began construction activity on the property. The engineer on the project was Giles Engineering Associates, Inc. (Giles) , which in November of 1992 performed a phase I and phase II assessment of the property. The 1992 assessment did not involve the subject contamination.

4. Terry Foss Enterprises was the excavation subcontractor on the site in June of 1994.

5. During excavation for a building foundation in June of 1994, petroleum contamination was discovered. The excavator reported to the appellant's president that an "extreme smell of gasoline [was] coming from the property. " The appellant's president told the excavator to contact Giles and clean up the property.

6. Because of prior remediation of the subject property, the appellant assumed that the petroleum contamination discovered in June of 1994 was residual contamination from the original fuel oil contamination remediated in 1993. The appellant did not intend or expect to be reimbursed for the 1994 - cleanup costs under the PECFA program. Giles was on site as the project engineer and assumed the role of environmental consultant for the remediation which occurred in June of 1994. Giles' consultant costs totalled $1,932.50.

7. The appellant neither obtained three consultant bids for comparison prior to using Giles for the above-referenced work, nor obtained three bids before the engagement of Link Associates (the general contractor) to excavate and haul the contaminated soil. This work was performed by Link on June 21, 1994.

8. Arrangements were made for disposal of the contaminated soil at Parkview Landfill. On June 21, 1994, 698 tons of soil were excavated and hauled to the Parkview Landfill. The associated landfill costs totalled $16,929.34. Soil samples were taken for diesel range organics (DRO) and gasoline range organics (GRO) determinations.

9. During the excavation activities on June 21, 1994, the contamination was discovered to be much more extensive than originally anticipated and a 550 gallon underground gasoline storage tank was discovered. The remediation activity stopped that day. No further work was undertaken until August of 1994.

10. In accordance with the provisions of PECFA, evidence of a hazardous substance release was reported to the Wisconsin Department of Natural Resources on June 23, 1994, pursuant to sec. 144.76(2), Stats.

11. In July of 1994, Key Environmental Services (Key) was selected as the consultant to complete the remediation using the three bid consultant proposal comparison. The three bid comparison method was also used for engagement of a commodities contractor, U. S. Environmental Corps.

12. On July 19, 1994, Key carried out a site assessment. On August 17, 1994, 725 tons of contaminated dirt were removed from the site and hauled to Parkview. Reimbursement of that work is not the subject of this appeal.

13. A 1,000-gallon underground fuel tank was removed from the property in 1993. A 1, 000 underground storage tank was also apparently removed from the subject property in 1989. A 550 gallon gasoline underground storage tank was removed from the subject property in August of 1994.

RELEVANT STATUTES AND RULES

Section 101.143, Stats., provides, in relevant part as follows:

(3) CLAIMS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES. (a) *Who may submit; a claim.* An owner or operator or a person owning a home oil tank system may submit a claim to the department for an award under sub. (4) to reimburse the owner or operator or the person for the eligible costs under sub. (4)(b) that the owner or operator or the person incurs because of a petroleum products discharge from a petroleum products storage system or home oil tank if all of the following apply:

3. The owner or operator or the person notifies the department, before conducting a site investigation or remedial activity, of the discharge and the potential for submitting a claim under this section, except as provided under par. (g).

5. The owner or operator or the person reports the discharge in a timely manner to the division of emergency government in the department of military affairs or to the department of natural resources, according to the requirements under s. 292.11.

6. The owner or operator or the person investigates the extent of the environmental damage caused by the petroleum product storage system or home oil tank system.

(c) Investigations, remedial action plans and remedial action activities. Before submitting an application under par. (f), except at provided under par. (g) , an owner or operator or the person shall do all of the following:

1. Complete an investigation to determine the extent of environmental damage caused by a discharge from a petroleum product storage system or home oil tank system.

2. Prepare a remedial action plant that identifies specific remedial action activities proposed to be conducted under subd. 3.

3. Conduct all remedial action activities at the site of the discharge from petroleum product storage system or home oil tank system necessary to restore the environment to the extent practicable and minimized the harmful effects from the discharge as required under s. 144.76.

4. Receive written approval from the department of natural resources that the remedial action activities performed under subd. 3 meet the requirements of s. 144.76.

(g) Emergency Situations. Notwithstanding pars. (a)3 and (c)1 and 2, an owner or operator or the person may submit a claim for an award under sub. 1) after notifying the department under par. (a)3, without completing an investigation under par. (c)1 and without preparing a remedial action plan under par. (c)2 if any of the following apply:

1. An emergency existed which made the investigation under par. (c)1 and the remedial action plan under par. (c)2 inappropriate.

2. The owner or operator or the person acted in good faith in conducting the remedial action activities and did not wilfully avoid conducting investigation under par. (c)1 or the remedial action plan under par. (c)2.

Section ILHR 47.015(12), Wis. Admin. Code, provides as follows-

"Emergency or emergency action" means a situation which requires an immediate response to protect public health or safety. Simple removal of contaminated soils, recovery of free product or financial hardship are not considered emergencies. An emergency action would normally be expected to be directly related to a sudden event or discovery.

DISCUSSION

The appellant contends that it is eligible for reimbursement under the PECFA program for the consulting services, landfill charges, and excavation and trucking that took place on or before June 21, 1994 pursuant to the provisions of sec. 101.143(3)(g), Stats., due to an emergency situation. The appellant argues that an emergency existed because the appellant's excavator expressed concern about the risk of explosion from the gasoline odors emanating from the excavation. However, no remediation activity was even undertaken until two to four weeks after the contamination was encountered. Moreover, if the appellant truly believed that the contamination posed an immediate threat to the public safety, it would have notified some authority, or taken some other immediate action to protect the public. The appellant did not do so. The appellant has failed to establish that any emergency existed within the meaning of the statutes or the administrative code.

Alternatively, the appellant contended that section 101. 143(3)(g)2, Stats., applies because it acted in good faith in conducting the June 1994 remedial action activities, and did not willfully avoid conducting the investigation or the remedial action plan. Although the department argues that sec. 101.143(3)(g)2, Stats., relates only to good faith within the context of an emergency, the statute states that it applies "if any of the following apply." The plain language of the statute does not link the good faith requirement to an emergency action. Accordingly, it must be determined whether the appellant acted in good faith when conducting the remedial action in this instance.

The appellant argues that because of prior remediation following removal of a fuel oil tank which was not eligible for PECFA reimbursement, it had every right to believe that the contamination discovered during the 1994 excavation was also from a non-eligible source, and that the clean-up costs - would be small. It therefore asserted that good cause existed because it expected to bear the full cost of the clean up without reimbursement. However, the owner was specifically alerted that the contamination discovered in June of 1994 was gasoline. That information should have alerted him to the possibility that the newly discovered contamination came from a new source. He chose to gamble that it was not from a new source and that any additional clean-up costs would be small. The June 17, 1993 DNR closure letter did not provide him with reasonable grounds for doing so. That letter stated merely that no additional remediation was then required, but that additional action might be required later if additional environmental impacts were detected.

While the owner was understandably concerned with rapidly getting the site cleaned up and proceeding with construction, the record demonstrates that the owner failed to inform himself of his legal obligations once additional contamination was discovered. The owner's testimony that he thought the contamination discovered in June of 1994 might have occurred when someone "dumped [a] lawn mower" on the site is not persuasive, particularly since that explanation would not explain the extent of the contamination that was encountered in June of 1994. Given the factors cited above, the owner failed to establish that he acted reasonably and in good faith.

PROPOSED CONCLUSIONS OF LAW

The Department's action denying reimbursement was reasonable as the appellant failed to comply with three specific requirements of chapter ILHR 47 of the Wisconsin Administrative Code: ILHR 47.01(4)(a), which required the selection of a consulting firm through a comparison of at least three proposals; ILHR 47.01(4)(b), which required the purchase or contract for commodity services though the use of competitive bids; and ILHR 47.01(4)(c), which required the consideration of the costs and benefits of at least three remediation alternatives.

PROPOSED DECISION

The State Hearing officer therefore finds that the department's decision dated June 24, 1996, denying the appellant's application for reimbursement of costs totaling $22,759.14 plus interest was reasonable.

STATE HEARING OFFICER
by
James H. Moe

96-227/jhm